15 = 423

~~January 19. 1880. Mr. D. N. A.~~

S. Ct. March 21/82

Orally argued

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 812. ~~246~~ 236

ALFRED MARCHAND PLAINTIFF IN ERROR,

vs

HENRY PRELLSEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 9, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 812.

ALFRED MARCHAND, PLAINTIFF IN ERROR,

vs.

HENRY FRELLSEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 UNITED STATES OF AMERICA.

Circuit court of the United States in and for the 5th circuit and district of Louisiana.

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 7986.

Transcript from fifth district court for the parish of Orleans.—Filed November 4th, 1876.

STATE OF LOUISIANA.

Fifth district court for the parish of Orleans.

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 1666.

Rule on surety on appeal bond.—Filed May 8th, 1876.

On motion of H. G. Morgan and Sam'l P. Blanc, attorneys for Henry Frellsen, and on their suggesting to the court that a judgment of
2 executory process, and an order of seizure and sale for thirteen thousand seven hundred and two $\frac{18}{100}$ dollars, with eight per cent. per annum interest from May 1st, 1870, till paid, was rendered in the above entitled suit against said defendant, on the 18th of May, 1870, in due form and according to law. That on the 26th day of May, 1870, Daniel Fairex, said defendant, took a suspensive appeal from said executory judgment, furnishing for that purpose his bond or obligation for twenty-three thousand dollars, with Alfied Marchand as surety, said bond being conditioned as an appeal bond in due form and according to law, and is hereto annexed as part of this motion.

That said Fairex was cast in the appeal aforesaid, and judgment was rendered by the supreme court of the State against defendant for five hundred dollars for a frivolous appeal, as damages, and maintaining the judgment appealed from.

That said judgment was duly certified to this hon. court, and
3 was admitted and entered of record for execution.

That after the said appeal had been taken, the property of defendant Fairex subject to said executory judgment was sold, pursuant to an order and judgment of the honorable the 7th district court for the parish of Orleans, in the suit No. 1438 on the docket of said court, and the proceeds divided rateably between concurrent mortgage claims and rights upon said property. That of said proceeds, after the payment of costs and taxes, six thousand five hundred and one $\frac{33}{100}$ dollars, was received and credited on account of the demand and executory judgment of said Henry Frellsen, in the matter wherein this motion is made, leaving a balance unpaid of nine thousand one hundred and forty-four $\frac{20}{100}$ dollars, with eight per cent. per annum interest thereon from the 3d day of February, 1872, until paid. That for said balance due herein, and upon the writ of seizure and sale herein issued, no property of the
4 defendant Fairex has been found by the sheriff, to whom said writ was directed, and no part of said balance has been satisfied, nor

is there any property or effects upon which said writ can be executed, or from which said balance can be obtained belonging to said Fairex.

That Daniel Fairex, said defendant, is dead, and his succession, which has been opened before the 2d district court for the parish of Orleans, has proved insolvent.

That in support of, and for a fuller explanation of the foregoing allegations, reference is made to the record of the suit and to the proceedings, in which this motion is taken, all of which are made part hereof.

That movers are entitled to proceed for said balance against Alfred Marchand, surety as aforesaid.

And finally they further suggest, that at and about the time said suspensive appeal was taken the property subject to the executory judgment was well worth one hundred and ten thousand dollars,
5 and could have been sold for sufficient to pay in full the claims and judgment of said Henry Frellsen.

It is ordered that Alfred Marchand show cause on the 23d day of May, 1876, at 10½ a. m., why he should not be condemned to pay unto Henry Frellsen the sum of nine thousand one hundred and forty-four $\frac{20}{100}$ dollars, with eight per cent. per annum from the third day of February, eighteen hundred and seventy-two, until paid, and five hundred dollars adjudged for damages for a frivolous appeal, as aforesaid, and for all costs.

(Signed) H. G. MORGAN &
SAM'L P. BLANC,
Att'ys for Pl'ff.

Sheriff's return on rule on surety, &c.

HENRY FRELLSEN
vs. } No. 1666.
DANIEL FAIREX.

Rec'd May 10, '76, and on the same day, month, and year, I served a copy of within rule on Alfred Marchand thro' R. Huberwald, his
6 agent, in person.
Ret. same day.
(Signed) EUGENE MESTIER,
Dy Sh'ff.

Petition of appeal made part of rule, &c.—Filed May 26th, 1870.

5th district court.

HENRY FRELLSEN
vs. } No. 1666.
DANIEL FAIREX.

To the honorable the judge of the fifth district court for the parish of Orleans:

The petition of Daniel Fairex, who resides in the parish of Orleans, with respect represents that Henry Frellsen, the plaintiff in the above cause, has taken out an order of seizure and sale on certain mortgage notes which, upon the face of the papers, it appears were given for slaves, and cannot be executed, and that petitioner feels aggrieved by the order or final judgment of date May 18th, 1870, and desires to ap-

peal suspensively therefrom, believing the same to be erroneous
7 and illegal.

Wherefore petitioner prays, in consideration of annexed bond, that he be allowed a suspensive appeal, returnable in supreme court on the first Monday of November, 1870, and petitioner prays that H. Frellsen be cited to answer the same, and prays for all general and equitable relief.

(Signed) COTTON & LEVY,
Att'ys.

Bond of appeal made part of rule, &c.—Filed May 26th, 1870.

HENRY FRELLSEN
vs. } No. 1666.
DANIEL FAIREX.

Know all men by these presents that we, D. Fairex as principal and A. Marchand as surety, are held and firmly bound unto Louis Power, the clerk of the fifth district court for the parish of Orleans, his executors, administrators, and assigns, in the sum of twenty-three thousand dollars, for the payment whereof we bind ourselves, our
8 heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated in the city of New Orleans, on this 29th day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas the above bounden Fairex has this day filed a petition of appeal suspensive from a final judgment rendered against him in the suit of H. Frellsen vs. D. Fairex, No. 1666, in the fifth district court for the parish of Orleans, on the 18th day of May, 1870:

Now, the condition of the above obligation is such that the above bounden D. Fairex shall prosecute this appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said Marchand, surety, shall be liable in his place.

(Signed) D. FAIREX. [L. S.]
A. MARCHAND. [L. S.]

9 Signed, sealed, and delivered in the presence of—
L. L. LEVY.

Decree of supreme court made part of rule, &c.—Filed 5th February, 1874.

HENRY FRELLSEN
vs. } No. 1666.
DANIEL FAIREX.

This is an appeal from an order of seizure and sale. The only question presented is, does the evidence authorize the issuing of the order? We think it clearly does. The appellee asks that damages be awarded for a frivolous appeal, and we think his claim well founded; the court therefore orders that the plaintiff and appellee recover from the defendant five hundred dollars as damages for a frivolous appeal, and that the appeal be dismissed at the costs of appellant.

Petition for removal of cause, &c.—Filed 22d May, 1876.

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 1666.

To the honorable the judge of the fifth district court for the parish of Orleans:

The petition of Alfred Marchand, an alien-citizen of the Republic of France, residing in Angoulême, France, shows with respect:

That a suit has been instituted against your petitioner herein by Henry Frellsen, and the amount involved exceeds the sum of five hundred dollars; that he is desirous of removing such suit for trial to the next circuit court of the United States for this district, and he makes and files this his petition in said suit, at the time of entering his appearance herein, and before the term at which said cause could be first tried and before the trial thereof, for the removal of such suit into the next circuit court to be held in the district of Louisiana, and he
11 makes and files herewith his bond, with good and sufficient surety, for his entering in such circuit court on the first day of its then next session, a copy of the record in such suit.

Wherefore your petitioner prays, the annexed bond considered, that an order do issue accepting the surety, and that no further proceedings be had herein against petitioner, and said cause be removed for trial to the next term of the circuit court of the United States for the district of Louisiana.

And he prays for all necessary orders in the premises.

(Signed) HORNOR & BENEDICT.
Att'ys for Pet'r.

W. S. Benedict, being duly sworn, deposes and says that he is the attorney of petitioner, who is absent from the State of Louisiana, and that all the facts and allegations of the foregoing petition are true and correct.

(Signed) W. S. BENEDICT.

Sworn to and subscribed before me this 20th day of May, 1876.

(Signed) PAUL T. ABADIE,
D'y Clk.

12 *Bond for removal of cause, &c.—Filed 22d May, 1876.*

Know all men by these presents that we, Alfred Marchand, as principal, and Wm. S. Benedict, as surety, are held firmly bound unto Henry Frellsen in the sum of five hundred dollars, for which payment well and truly to be made as aforesaid we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these present, sealed with our seals and dated this 22d day of May, 1876.

Whereas the said Alfred Marchand has this day filed a petition in the fifth district court for the parish of Orleans, praying that the case of Henry Frellsen vs. Daniel Fairex be removed for trial to the next term of the circuit court of the United States for the district of Louisiana:

Now the condition of the above obligation is such that if the said Alfred Marchand shall on or before the first day of the next term
13 of the said U. S. circuit court file therein, and enter or cause to

be entered in said court copies of all process, pleadings, or other proceedings in said suit, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) ALF. MARCHAND,
By HORNOR & BENEDICT, [L. S.]
Att'ys.
W. S. BENEDICT. [L. S.]

Approved & surety accepted.
(Signed) E. NORTH CULLOM,
Judge.

Order removing cause, &c.

Let this cause be transferred and removed for trial to the next term of the circuit court of the United States for the district of Louisiana, upon bond being given with solvent surety in the sum of five hundred dollars.

New Orleans, May 22d, 1876.
(Signed) E. NORTH CULLOM,
Judge.

I, Thomas Duffy, clerk of the fifth district court for the parish
14 of Orleans, and as such duly commissioned and sworn, do hereby certify that the above and foregoing (17) seventeen pages contain a true and correct transcript of all the pleadings and proceedings had and documents filed in the case of Henry Frellsen vs. Alfred Marchand, No. 1666 of the docket of our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this fifth day of June, in the year of our Lord one thousand eight hundred and seventy-six, and in the one hundredth year of the Independence of the United States of America.

[SEAL.] (Signed) THOMAS DUFFY,
Clerk.

I, E. North Cullom, sole judge of the fifth district court for the parish of Orleans, do hereby certify that Thomas Duffy is the clerk of said court; that the same is a court of record, and that the signature,
15 "Thomas Duffy, clerk," to the foregoing certificate is in the proper handwriting of him, the said Thomas Duffy, clerk; to his official acts as such full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand, at the city of New Orleans, on the fifth day of June, in the year of our Lord one thousand eight hundred and seventy-six.

(Signed) E. NORTH CULLOM,
Judge.

I, Thomas Duffy, clerk of the fifth district court for the parish of Orleans, do hereby certify that E. North Cullom, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, sole judge of the fifth district court for the parish of Orleans, duly elected and commissioned and qualified as such, and that said attestation is in due form of law.

16 Witness my hand and the seal of said court this fifth day of June, 1876.

[SEAL.] (Signed) THOMAS DUFFY,
Clerk.

Answer of Alfred Marchand.—Filed March 20th, '77.

U. S. circuit court.

HENRY FRELLSEN
vs. } No. 7986.
DANIEL FAIREX.

Now into court comes Alfred Marchand, defendant herein, and reserving all legal exceptions, for answer admits his signature to the alleged bond declared upon, and denying any liability thereunder, he pleads a general denial except as herein admitted, and for further answer says:

That true it is the order of seizure and sale herein averred was not executed by said plaintiff, but the cause therefor arose from the acts of said plaintiff, who was holder of the note bearing mortgage upon the property sold by process from the seventh district court, as
17 alleged, and no other mortgage existed upon said property save that held by said plaintiff, who became the purchaser of said property at said sale, and is thereby estopped from proceeding against your respondent herein; that said plaintiff has, by his said acts, made it impossible and placed it beyond the power of respondent to satisfy the alleged order of seizure and sale herein, or the alleged decree on appeal therefrom; that said plaintiff, without respondent's consent, has, by his said acts, impaired respondent's rights to subrogation, and respondent is thereby released from liability, if any existed, which is denied.

Wherefore respondent prays judgment for defendant with costs and for all general relief.

(Signed) HORNOR & BENEDICT,
Att'ys.

Waiver of jury.—Filed April 13th, 1878.

H. FRELLSEN
18 *vs.* } No. 7986.
D. FAIREX.

Jury waived and agreed to try the case by the court.
April 13th, 1878.

(Signed) HORNOR & BENEDICT,
For Def't.
SAM'L P. BLANC, *For Pl'ff.*

Exception.—Filed April 13th, 1878.

U. S. circuit court.

HENRY FRELLSEN
vs. } No. 7986.
DANIEL FAIREX.

Defendant pleads the prescription of five years and of one year as a peremptory exception to the plaintiff's demand.

Wherefore he prays said plea be maintained and this suit be dismissed.

(Signed) HORNOR & BENEDICT,
Att'ys.

19 *Hearing & continuance of cause.—Extract from the minutes, November term*, 1877.

NEW ORLEANS, *Saturday, April 13th*, 1878.

Court met pursuant to adjournment.
Present, E. C. Billings, district judge.

HENRY FRELLSEN
vs. } No. 7986.
DANIEL FAIREX.

This cause came on for trial by the court, the counsel having filed a stipulation waiving the jury.
S. P. Blanc & H. G. Morgan, for Frellsen.
Hornor & Benedict, for defendant.
And after hearing the pleadings and evidence, the cause is continued till Tuesday, 16th instant, at 10 a. m.

Hearing & submission of cause.—Extract from the minutes, April term, 1878.

NEW ORLEANS, *Saturday, April 27th*, 1878.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

HENRY FRELLSEN
vs. } No. 7986.
DANIEL FAIREX.

20 The trial of this cause was resumed, when, by consent of counsel, the cause was submitted without further argument, ten days being allowed plaintiff's counsel to furnish brief.

Order extending time, &c.—Extract from the minutes, November term, 1878.

NEW ORLEANS, *Tuesday, January 28th*, 1879.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

HENRY FRELLSEN
vs. } No. 7986.
DANIEL FAIREX.

On motion of Hornor & Benedict, attorneys for defendant, ordered that the time within which to furnish further evidence under the order of 24th instant be extended for 10 days from this date.

Submission of cause.—Extract from the minutes of March 17, 1879.

HENRY FRELLSEN
21 *vs.* } No. 7986.
DANIEL FAIREX.

This cause came on further to be heard, and having been argued by

S. P. Blanc for the plaintiff, and Hornor & Benedict for Alfred Marchand, the court took time to consider.

Decree on rule against Alfred Marchand, surety.—Extract from the minutes of March 21, 1879.

HENRY FRELLSEN } No. 7986.
vs.
DANIEL FAIREX. }

It is ordered, adjudged, and decreed that there be judgment in favor of Henry Frellsen, plaintiff, and against Alfred Marchand, the defendant, for nine thousand one hundred and forty-four $\frac{20}{100}$ dollars, with eight per centum per annum interest on said amount, from the third day of February, eighteen hundred and seventy-two, until paid; and for the further sum of five hundred dollars, damages allowed
22 by the supreme court of Louisiana for a frivolous appeal in the case of Henry Frellsen vs. Daniel Fairex, and for all costs of suit.

Order referring case to master, &c.—Extract from the minutes of M'ch 22d, '79.

HENRY FRELLSEN } No. 7986.
vs.
DANIEL FAIREX. }

On motion of Hornor & Benedict, attorneys for defendant, and on suggesting the opinion of the court herein, and that plaintiff and defendant are unable to agree upon the amount of the pro rata to be credited to the defendant, it is ordered that the parties herein be referred to F. A. Woolfley, master, who is hereby directed to ascertain and report the pro rata due from the proceeds of sale of the property mortgaged, to the various notes held by the plaintiff in this suit, and the entry on the minutes of date 21st March instant be erased and cancelled.

23 *Report of master.—Filed April 19th*, 1879.

In the circuit court of the United States for the district of Louisiana.

HENRY FRELLSEN } No. 7986.
vs.
DANIEL FAIREX. }

To the honorable the judges of the circuit court of the United States for the district of Louisiana:

The undersigned master, who was required by an order made and entered in the above entitled cause "to ascertain and report the pro rata due from the proceeds of sale of the property mortgaged, to the various notes held by the plaintiff in this suits," respectfully reports that he has considered the claims presented by the plaintiff and defendant under said order. I do not understand that I can, under the reference, make such an inquiry as the defendant asks for in his claim. To entertain the claim of the defendant would be reviewing the acts of State
24 officials. The plaintiff has admitted some of the items resisted by the defendant and are therefore allowed by me.

The basis of the plaintiff's claim and the contest between the parties is the sheriff's statement Z on file in this case. An examination of said statement shows that it is in some respects inaccurate. Corrections have been made to enable me to make this report, as appears by my statement marked Exhibit A submitted herewith.

I find and report the sum of eight thousand seven hundred and ninety-two dollars and ninety-seven cents ($8,792.97) as the balance due to the plaintiff as shown by said Exhibit A, and that he is entitled to recover from the defendant, Alfred Marchand.

The claims of the plaintiff and defendant are submitted herewith.

April 19, 1879.

Respectfully submitted.

(Signed) F. A. WOOLFLEY,
Master.

HENRY FRELLSEN
versus
DANIÉL FAIREX. } No. 1438.

Seventh district court, parish of Orleans.

Property sold in above suit by the sheriff of the parish of St. Charles to Henry Frellsen for		$40,000 00	
Charges:			
Amount paid to sheriff of the parish of St. Charles for costs and charges and taxes "receipt in deed"	$2,914 27		
" " for State taxes, 1871, on the property sold	1,038 88		
" " " clerk's fees of the 7th dist. court, $5,260, and for sheriff's fees parish of Orleans, $11.35	63 95	4,017 10	
Net proceeds of sale		$35,982 90	$35,982 90

Mortgage notes on property sold bearing 8 p. c. interest per annum after maturity.			Face of notes at maturity.	Interest on notes from maturity to Feb'y 3d, 1872.	Amount of notes and interest.	Pro rata accrued out of nett proceeds of sale.		Balance due on notes Feb'y 3d, 1872.
1st. 1 note dated December 31st, 1863.	Due May 1st, 1869		A $11,000 00	$2,439 55.5	$13,439 55.5	$5,886 35.9		$7,553 19.6
2d. 1 " " " " "	" " " "		A 5,390 "	1,195 38.0	6,585 38.0	2,884 31.5		3,701 06.5
3d. 1 " " " " "	" " 1st, 1870	$11,000 00						
	Less a credit of	1,917 22						
	Balance due on May 1st, 1870	$9,082 78	B $9,082 78	1,287 73.6	T $10,370 51.6	4,542 15.8	C	D $5,828 35.8
4th. 1 " " " " "	Due May 1st, 1870		B 4,020 "	655 01.1	5,275 01.1	2,310 38.9	C	D 2,964 62.2
5th. 1 " " " " "	" " 1st, 1872		2,484 58.4		11,000 00.0	4,817 86.4		6,182 13.6
6th. 1 " " " " "	"Interest note" for $3,080 00, due May 1st, 1872.	Less 87 days' interest from date of sale to maturity.	11,000 "		2,484 58.4	1,088 21.7		1,396 36.7

7th. 1	"	"	"	"	"	Due May 1st, 1873				11,000 00. 0	4,817 86. 4		6,182 13. 6
8th. 1	"	"	"	"	"	"Interest note" due May 1st, 1873	3,210 00	22,000 "					
9th. 1	"	"	"	"	"	" " 1st, 1874				22,000 00. 0	9,635 72. 9		12,364 27. 1
10th 1	"	"		"	"	"Interest note" " " " " for	1,540 00						
						Totals		$76,577 36. 4	$5,377 68. 2	$82,155 04. 6	$35,982 89. 5	$35,982 90	$46,172 15. 1

A. Notes sued on in 7th district court.
B. Notes sued in 5th district court.
C. Pro rata share coming to notes sued on in 5th district court.
D. Balance due on notes sued on in 5th district court on Feb'y 3d, 1872, date of sale, $8,792.97.

26 *Entry at rules.—Extract from chancery order-book.*

HENRY FRELLSEN
vs. } 7986.
DANIEL FAIREX.

APRIL 19TH, 1879.

The parties in interest in this case are hereby notified that F. A. Woolfley, master, has this day filed his report as to the balance due to the plaintiff in said case.

Claim of plaintiff referred to and submitted with report of master.—Filed April 19th, 1879.

F. A. WOOLFLEY, Esq.,
Master:

DEAR SIR: The judgment in this case, as rendered, is in words and figures correct, the sum of $9,144\frac{20}{100}$ being the proper amount to be allowed under the law and the evidence in the case as presented and submitted to the court. The statement marked Z, offered and admitted in evidence without opposition, is an exact statement of the apportionment made of the proceeds of the sale of the plantation, showing the exact pro rata coming to each and every outstanding note bearing on the mortgaged property. This apportionment was made by the sheriff himself, and fixes the pro rata share of each note. But should everything claimed in defendant's 1° suggestion be allowed, we submit that even then he will be entitled to a reduction on the judgment of only $369.01, as the following table will clearly show. The notes past due on the 3d Feb'y, 1872, the day of sale, are as follows:

27

Note due May 1st, 1869		13,439 55
Int. " " " " "		6,585 38
" " " " 1870		10,370 51
" " " " "		5,275 02
" " " " 1872		11,000 00
" " " " "	$3,080 00	
3 months' int. to be deducted	700 00	
	$2,310 00	2,310 00
" " " " 1873		11,000 00
" " " " " $2,310.00 not allowed		00,000 00
" " " " 1874		22,000 00
" " " " " $1,540.00 not allowed		00,000 00
Amt. of notes, prin'l & int., due 3 Feb'y, '72, day of sale		$81,980 46

28 Net proceeds of sale of plantation, as per statement Z, is $35,986.90; that amount, multiplied by the amount of the notes sued on in the 5th district court, & marked T in statement Z, which are the notes sued on herein, and you have 56,303,412,355.70, which divided by $81,980.46, the amount of all the notes due, will give you $6,870.34 as the pro rata coming to the notes sued on herein, instead of $6,501.33, as allowed by statement Z (by Ricker), being a difference in favor of defendant of only $369.01, as stated above.

The 2d suggestion "is" not "apparent" from the record, and "does" not "fall within the reference made by the court to you." There is not

one line or word of proof in the record to sustain the suggestion. The pro rata on the notes mentioned therein never has been paid, and the receipt presented to you never having been offered in evidence on the trial, and which should therefore be disregarded, is for but a few dollars more than the damages ($1,600.00) allowed by the supreme
29 court for a frivolous appeal, and therefore cannot be considered as a pro rata on the notes in the suit therein mentioned. But if the entire amount of the notes and damages in that suit had been paid it could have no possible effect on the case before you, which is an entirely different case on entirely different notes. Besides which the pro rata distribution was made by the sheriff on the 3d Feb'y, 1872, the day of sale, and the receipt presented was given on 3d Dec., 1873, about a year after the pro rata was made and the balances on all the outstanding notes & fixed and rendered on the said notes. Payment, therefore, of the other suit in full, if it had been made, could not have affected the amount involved in this suit on other different notes. This is too evident to require argument.

The 3d suggestion is as little worthy of attention as the 2d, for the question as to whether or not the sheriff was entitled to his fees
30 as charged by him for selling the property, and whether the taxes paid were or were not due, are matters which were not referred to you, and could not be determined by you in this way, even if they had been so referred. The calculations of interest, as set forth in the statement marked Z, are said to be correct by Mr. Ricker, and we believe them to be so.

We therefore submit that the judgment of the court must remain as it now stands. Taking, however, the most favorable view of defendant's brief, and rejecting all of the interest notes not due on the day of sale, 3d Feb'y, 1872, he is entitled, as above stated, to a reduction of only $369.01 on the judgment as rendered by the court.

Respectfully submitted.

(Signed) H. G. MORGAN & S. P. BLANC,
For Pl'ff.

Claim of defendant referred to and submitted with report of master.—Filed April 19, 1879.

NEW ORLEANS, *March 24th*, 1879.

31 F. A. WOOLFLEY, Esq.,
Master:

DEAR SIR: The plaintiff claims in this case $9,144.20, with 8% interest from the 3d day of February, 1872, as being the balance due on the notes sued upon by him against Fairex after crediting said notes with the pro rata of proceeds of sale of the plantation.

We suggest that this balance of $9,144.20 is erroneous, for the following reasons:

1°. Statement Z (page 80 of this transcript), filed as the basis of this claim, shows said balance to be due on the two notes, specified in pencil as B C D. Refer to the act of sale of the plantation and you ascertain the total price, $40,000.00. Refer to act of mortgage and you will see what remained due and unpaid, and the maturity of the various obligations.

The last note on statement Z, $1,540, due 1 May, 1874, is an
32 interest note, being the interest on the balance of the principal due on that date for the preceding year of 1873.

The plantation was sold on the 3d February, 1872. To that date all interest must be calculated; therefore, to include $1,540.00 interest for the principal due from the 1st of May, 1873, to the 1st of May, 1874, is clearly erroneous. This remark is equally applicable to the interest note due the 1st May, 1873, of $2,310.00, being for interest on the principal due on the 1st of May, 1873, for the preceding year; this, therefore, is likewise erroneous. To the same import is a certain proportion of the note due the 1st May, 1872, for $3,080.00. The principal due on the 1st day of May, 1871, is to be allowed interest to the 3d February, 1872, less the notes due 1st May, 1871, which were paid; and therefore this note of $3,080.00 is to be reduced by the difference of interest on the principal from the 3d of February, 1872, to the 1st of May, 1872. We apprehend that you will find no difficulty in following our views
33 as to these interest notes.

2°. We contend that the two first notes on this statement Z, namely, the one due 1st May, 1869, for $11,000.00, and the one due 1st May, 1869, for $5,390.00, together with the accrued interest to the 3d February, 1872, making, all told, that day $20,024$\frac{93}{100}$, are not to be considered in this account or charged against Alfred Marchand, surety, for the liability of Alfred Marchand, the present defendant, for the pro rata claimed to be due to those notes was fixed, dermined, settled, and paid, in the suit in the seventh district court, the receipt for which amount is hereto annexed and marked A, because it is a self-evident proposition that where a man is sued for his liability upon certain notes and it is fixed by a judgment, and that judgment is paid and compromised and full acquittance given, the party sued cannot be again called upon to pay the amount a second time.

3°. We contend this statement Z is further erroneous in this:
34 The price of sale was $40,000.00. The costs, charges, and taxes which we admit against that sum are as follows:

State taxes of 1871	$1,290 55
Parish do. of 1871	734 72½
Clerk's costs seventh district court	52 60
Sheriff's fees parish of Orleans	11 35

We contest any and all other claims for dimunition of this price of sale of $40,000.00.

We specially oppose the item "Internal revenue stamps on deed of sale $40.00," because it is chargeable to the purchaser of the property and not to the defendant in the suit.

State taxes of 1872 (annexed to deed of sale), as not due, except for one month and three days thereof, out of twelve months, and therefore to be reduced by about $\frac{1}{12}$, they were not payable until about 1873, were not paid by sheriff or charged by him.

4°. The calculation of interest on the note of $11,000.00 due May 1st, 1870, subject to credit of $1,917.22, appears in statement $1,287.73; the correct amount is $1,275.52. The calculation of interest on the
35 other note due 1st May, 1870, $4,620.00 appears on statement to be $655.02; the correct amount is $648.86.

All of the above matters are apparent from the record and fall within the reference made by the court to you. We call your attention to the same for your determination upon the record.

Respectfully submitted,

(Signed) HORNOR & BENEDICT,
For Def't.

Receipt A.—Annexed to the foregoing claim of def't.

$1,900.00.

Received New Orleans, December 3d, 1873, of Alfred Marchand the sum of nineteen hundred dollars in full settlement and compromise of claim and judgment in the case of Henry Frellsen vs. Daniel Fairex on rule against Alfred Marchand, surety on appeal bond, which suit is No. 41340 of the docket of the fourth district court for the parish of Orleans, and the one in which a motion for appeal has been lately filed by the said Frellsen.

36 (Signed) H. G. MORGAN,
Att'y for Frellsen.

Exceptions to report of clerk.—Filed April 24th, 1879.

U. S. circuit court.

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 7986.

The exception of Alfred Marchand to the report of the clerk herein, filed on the 19th April, 1879, with respect represents:

First. That said clerk has erroneously charged against exceptor as due plaintiff the notes due May 1st, 1869, one for $11,000.00 the other for $5,390.00 with accrued interest to February 3d, 1872, making all told 20,024.93 for this, viz:

a. That the pro rata claimed to be due said notes was settled and paid in suit in the seventh district court, in evidence, and full acquittance granted exceptor therefor as appears by the receipt of plaintiff on file.

37 *b.* That exceptor is not sued as surety for such notes, as his liability therefor is res judicata and said judgment is satisfied.

Second. That said clerk has erroneously charged against exceptor State taxes of 1872 $1,038.88 (erroneously called in his report tax of 1871, as the receipt shows it was for tax of 1872), inasmuch as but one month and eleven days of said year 1872 had elapsed, and said tax was not due and payable until 1st January, 1873.

Third. That said clerk has even charged against your exceptor the costs of deed of sale to plaintiff, and stamps, which are not due by defendant in any event, but solely by purchaser.

Fourth. That said clerk has erroneously charged against exceptor $825.05 as sheriff's costs without any evidence of the same being due.

Wherefore exceptor prays said report be referred back to the clerk with instructions to report in accordance with the foregoing exceptions.

And he will ever pray, &c.

(Signed) HORNOR & BENEDICT.

38 *Exception submitted.—Extract from the minutes Ap'l 30th, 1879.*

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 7986.

The exception to the master's report came on to be heard, and having been argued by counsel, the court took time to consider.

Statement of master.—Filed May 26th, 1879.

HENRY FRELLSEN *versus* DANIEL FAIREX. } No. 1438.

Seventh district court, parish of Orleans.

Property sold by the sheriff of the parish of St. Charles to Henry Frellsen for			$40,000 00
Charges:			
Amount paid to the sheriff of the parish of St. Charles for costs & charges & taxes, (Receipt in deed)	$2,914 27		
(" " for State taxes, 1871, on property sold $1,038.88 not allowed by the U. S. circuit court.)			
" " " clerk's fees of the 7th dist. court $52.60, and for sheriff's fees parish of Orleans $11.35	63 95	2,978 22	
Net proceeds of sale		$37,021 78	$37,021 78

Mortgage notes on property sold, bearing 8 p. c. per annum after maturity.		Face of notes at maturity.	Interest on notes from maturity to Feb'y 3d, 1872.	Amount of notes and interest.	Pro rata accrued out of net proceeds of sale.		Balance due on notes Feb'y 3d, 1872.
1st. 1 note dated December 31st, 1863. Due May 1st, 1869		$11,000 00	$2,439 55.5	$13,439 55.5	$6,056 30.7		$7,383 24.8
2nd. 1 " " " " " " " " " "		5,390 00	1,195 38	6,585 38	2,967 58.9		3,617 79.1
3d. 1 " " " " " " 1st, 1870	$11,000 00						
" " Less a credit of	1,017 22						
" " Balance due on May 1st, 1870	9,982 78						
4th. 1 " " " " " Due May 1st, 1870		B { 9,982 78 / 4,620 00	1,287 73.6 / 655 01.1	T { 10,370 51.6 / 5,275 01.1	4,673 29.7 / 2,377 09.4	C D	{ 5,697 21.9 / 2,897 91.7
5th. 1 " " " " " " " 1st, 1873		11,000 00		11,000 00	4,956 96.3		6,043 03.1
6th. 1 " " " " " " " " " Less 87 days interest from date of sale to maturity.	{ Interest note for $3,080.00 }	2,844 58.4		2,484 58.4	1,119 63.5		1,364 94.9
7th. 1 " " " " " " 1st, 1873		11,000 00		11,000 00	4,956 96.3		6,043 03.1
8th. 1 " " " " " " interest note ($2,310.00) for	2,310 00						
9th. 1 " " " " " " 1st, 1874		22,000 00		22,000 00	9,913 92.7		12,086 07.3
10th. 1 " " " " " " interest note for	1,540 00						
Tota's		$76,577 36.4	$5,577 68.2	$82,155 04.6	$37,021 77.5	$37,021 78	$45,133 27.1

A Notes sued on in the 7th district court.
B " " " " " 5th " "
C Pro rata share coming to notes sued on in 5th dist. court.
D Balance due on notes sued on in 5th dist. court on Feb'y 3d, 1872, date of sale, $5,595 13.6.

(Signed) F. A. WOOLFLEY, *Master.*

40 *Order.—Exception overruled.—Extract from the minutes of May 26, 1879.*

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 7986.

This case came on to be heard on the exceptions of Alfred Marchand, surety on appeal bond, to the report of the master herein, of the balance due by said Alfred Marchand to the plaintiff on the notes sued on in the fifth district court for the parish of Orleans, and was argued by counsel; on consideration whereof it is ordered that the said exceptions be, and the same are hereby, overruled, and that said report be confirmed except as to the item of $1,038.88 for taxes of 1871, which is maintained, and the balance reported by the master to be due by said Marchand is therefore reduced to the sum of $8,595.13, according to the statement of the master filed this day.

It is further ordered that a fee of $100.00 be allowed to the master for his services herein.

41 A.

Finding of facts by the court.—Filed June 4th, 1879.

United States circuit court, district of Louisiana.

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 7986.

The attorneys of the parties hereto having filed a stipulation in writing waiving the intervention of a jury, this cause came on to be heard by the court on the pleadings and evidence, and the court being fully advised in the premises, finds that the facts are as follows:

First. On the 18th May, 1870, the plaintiff filed a petition in the fifth district court for the parish of Orleans, praying for an order of seizure and sale of certain property situated in the parish of St. Charles, State of Louisiana, and praying further that the said property be seized by the sheriff of said parish and sold for cash to pay two promissory
42 notes then due, one for $11,000, dated December 31st, 1863, maturing May 1, 1870, on which there was a credit of $1,917.22 of the date of May 1st, 1870; and the other note, dated and maturing at the same time, for the sum of $4,620, and on terms of credit to pay the following notes; all the notes being date December 31, 1863, to wit: Two notes maturing May 1, 1872, one for $11,000 and one for $3,080; two notes maturing May 1st, 1873, one for $11,000 and the other for $2,310; two notes maturing May 1st, 1874, one for $22,000 and the other for $1,540.00; all of the notes bearing interest at the rate of eight per cent. per annum from maturity. All these notes were made by the defendant Fairex to his own order, and by him endorsed. The act of sale and the mortgage which secures the payment of said notes is hereto annexed, marked Exhibit A. On the same day, to wit, May 18th, 1870, an order of court was made, without notice, according to the practice in the courts of the State of Louisiana, the mortgage importing
43 a confession of judgment, which order was in the following words, to wit:

Let a writ of seizure and sale issue as herein prayed for, according to law.

New Orleans, May 18, 1870.

CHARLES LEAUMONT,
Judge.

2d. On the 26th May, 1870, the defendant Fairex applied for and had granted to him an appeal from the said decretal order or judgment to the supreme court of the State of Louisiana, and gave his bond upon said appeal, with Alfred Marchand his surety, for the sum of $23,000, the penal amount of said bond, said bond being conditioned as follows:

"Now, the condition of the above obligation is such that the above bound Fairex shall prosecute this appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if
44 he be cast in the appeal, otherwise that the said Marchand, surety, shall be liable in his place."

A copy of said bond is hereto annexed, marked Exhibit B.

3d. On the 19th January, 1874, the supreme court rendered its decision on said appeal, and its decree is as follows: "The court, therefore, orders that the plaintiff and appellee recover from the defendant five hundred dollars as damages for a frivolous appeal, and that the appeal be dismissed at the costs of appellant."

4th. Daniel Fairex, the defendant, died on the 26th August, 1871; his widow, as administratrix of his estate, was made party to the appeal in the supreme court on the 4th day of December, 1873. Pending this appeal in the supreme court the present plaintiff, on the 28th day of November, 1871, issued an alias writ of seizure and sale from the seventh district court against the same property to satisfy the sum of $16,390, amount of two of the notes secured by the same mortgage,
45 and immediately preceding in maturity those sued upon in the fifth district court, with interest on said sum at 8% from the 1st day of May, 1869, with 10% damages on the amount of principal and interest, for a frivolous appeal from the original order of seizure and sale in that case. Under this alias writ the sheriff of the parish of St. Charles sold the property so mortgaged to the plaintiff on the 3d day of February, 1870, for the price and sum of $40,000.00 cash.

5th. That the notes held by the plaintiff sued upon in the fifth district court were credited with the pro rata amount arising from the proceeds of the sale of the mortgaged premises, to wit, $7,050.39, and after such credit there remained due upon said notes the sum of $8,595.13.

6th. On the 21st day of May, 1872, a rule was taken on Alfred Marchand, in the seventh district court, to hold him liable as surety on the bond in that case, under the same conditions as that declared on herein, for the balance due upon the notes therein declared upon, stated
46 to be $13,342.51, with costs, after crediting the same with the pro rata stated to be due thereon from the sale of the plantation. Copies of said rule and bond are hereto annexed, marked Exhibits C^1 C^2. A judgment upon said rule was entered against Alfred Marchand for the sum of $1,639.00, with interest and costs amounting to $1,900.00, which was tendered and accepted by Henry Frellsen, plaintiff, in full satisfaction, on the 3d day of December, 1873. The court further finds that the rule taken in the seventh district court case was in a suspensive appeal from an executory order or judgment granted on notes entirely distinct from the notes sued on in the case before the fifth dis-

trict court, except that said notes were all secured by one mortgage and held by Henry Frellsen, on the property sold. That the demand in the rule against Marchand, in the seventh district court, not only included the balance unpaid on the notes sued on before said seventh district court, with costs and interest, but also sixteen hundred and thirty-
47 nine dollars damages allowed by the supreme court of the State of Louisiana, for a frivolous appeal, and the district court gave judgment in said rule for said damages and all costs on the 4th day of November, 1873, from which an appeal was taken; but the matter was subsequently compromised and settled for nineteen hundred dollars, as per receipt hereto annexed as Exhibit D. That said proceedings in the seventh district court on said bond were on an obligation entirely distinct from the proceedings and obligation sued on in the case at bar, and the notes sued on in the said cause received a pro rata of the proceeds of the property, as will appear from the distribution set forth in a copy of a statement of said distribution hereto annexed as Exhibit E.

7th. On the 8th day of May, 1876, Henry Frellsen instituted the present proceedings against Alfred Marchand, as surety on the appeal
48 bond in the fifth district court, and on the 22d day of May, 1876, Alfred Marchand, the surety, removed the same from the fifth district court for the parish of Orleans into this court.

And as a conclusion of law upon said facts, the court is of opinion that the plaintiff, Henry Frellsen, is entitled to recover from the defendant, Alfred Marchand, the surety on said appeal bond, the balance due on the notes sued on in the fifth district court for the parish of Orleans, to wit, the sum of $8,595.13, with interest thereon at the rate of 8% per annum from the 3d day of February, 1872, until paid, and $500 as damages allowed by the supreme court of the State of Louisiana for a frivolous appeal.

Therefore it is considered by the court that plaintiff, Henry Frellsen, do have and recover from the defendant, Alfred Marchand, the sum of $8,595.13, with interest thereon at the rate of 8% per annum from the 3d day of February, 1872, until paid; $500.00 as damages al-
49 lowed by the supreme court of the State of Louisiana for a frivolous appeal and the costs of suit.

June 4th, 1879.

(Signed) EDWARD C. BILLINGS,
Judge.

Exhibit A.—Annexed to the foregoing finding of facts.—Filed April 13th, 1878.

* * *

and City of New Orleans:

Be it known that on this thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-three, before me, Hugh Madden, a notary public in and for the parish and city of New Orleans, State of Louisiana aforesaid, duly commissioned and qualified, and in presence of the witnesses hereinafter named and undersigned, came & appeared:

Henry Frellsen, of this city, unmarried, who declared that for the
50 consideration and on the terms and conditions hereinafter expressed, he does, by these presents, grant, bargain, sell, convey, transfer, assign and set over, with all legal warranties, unto Daniel Fairex, also of this city, and here present, accepting and purchasing

the same, for himself, his heirs and assigns, and acknowledging delivery and possession—

A certain sugar plantation known by the name of the Fairview Plantation, situate in the parish of St. Charles, in this State, on the left bank of the river Mississippi, at about eighteen miles above the city of New Orleans, formerly measuring twenty-nine and three-fourths arpents, or thereabouts, front on said river, but now supposed to measure about thirty-two arpents, on account of the levees being moved back and extending in depth to Lake Pontchartrain in the rear, on which it has a front of eighty-one and one-fourth arpents, more or less, the whole bounded on the upper side by the plantation formerly * * by
51 J. F. Peseros, and now or lately by A. * * * Kenner Brothers, tog * * * the buildings and imp * * * and machinery, stock, horses, mu * * * carts, farming utensils and implemen * * * of husbandry on the said plantation, and all the rights, ways, privileges, customs, ways, servitudes and appurtenances thereto belonging or in anywise appertaining.

The said plantation was acquired by said vendor by purchase from Augustus W. Walker per act passed before Theodore Guyol, a notary public in this city, on the sixteenth day of April, one thousand eight hundred and fifty-seven.

Also is included in this sale all the right, title, interest, property, claim and demand of the said Henry Frellsen of, in, and to all the negroes, slaves for life, which are now on, or were attached to said plantation, except the domestic servants of said Frellsen, to wit,
52 Arthur and Eliza and their children. Said attached slaves are the following, to wit:

Charles, driver,	aged about	fifty-five	years.
Matilda,	" "	" "	"
Adeline,	" "	eighteen	"
Juin,	" "	thirty-one	"
Thornton,	" "	forty-one	"
Long Louisa,	" "	forty-six	"
Chapman,	" "	thirty-nine	"
Candide,	" "	forty-one	"
Idie,	" "	eighty-seven	"
Sam,	" "	twenty-one	"
Harriet,	" "	thirty-one	"
Nelson, cooper,	" "	forty-three	"
Louisa,	" "	fifteen	"
Humphreys, sawyer,	" "	thirty-nine	"
Tena,	" "	sixteen	"
* * * lagie,	" "	forty-one	"
* * *	* * *	* * *	
* * *	" "	twenty-one	"
* * *	" "	twenty-five	"
* * *	" "	seventy	"
* * *	" "	fifty-one	"
Little Louisa,	" "	thirty-one	"
Lee, carpenter,	" "	sixty	"
Paul,	" "	twenty-seven	"
Sandy,	" "	thirty-eight	"
May, cook,	" "	forty-eight	"
Marie,	" "	twenty-two	"
Manuel,	" "	fifteen	"

	Landon,	aged	about	forty-seven	years.
	Cily,	"	"	twenty	"
53	Elizabeth,	"	"	nine	"
	Levi,	"	"	twenty-seven	"
	Manetti,	"	"	twenty-eight	"
	Jacob,	"	"	thirty-five	"
	Edwin,	"	"	fifty-one	"
	Toby,	"	"	nineteen	"
	Chalinette (nurse),	"	"	seventy	"
	Ursule (midwife),	"	"	sixty-one	"
	Anthony,	"	"	thirty-six	"
	Anderson (cooper),	"	"	forty-three	"
	Therizine,	"	"	twenty-five	"
	Nomme,	"	"	twenty-one	"
	Michael,	"	"	forty-three	"
	Lazare,	"	"	sixty-three	"
	Big John,	"	"	sixty	"
	Alfred (mason),	"	"	thirty-nine	"
	Pnetir (mason),	"	"	forty-four	"
	Patrick,	"	"	sixty	"
	Sally, volant,	"	"	fifty-six	"
	Adam,	"	"	forty-six	"
	Ned (gardner),	"	"	sixty-three	"
	Bob (cooper),	"	"	sixty	"
	Giles,	"	"	thirty-five	"
	Leander,	"	"	twenty-seven	"
	Peggy,	"	"	thirty-three	* *
	* * *	"	"	fifteen	* *
	Bartlett,	ag*	*	* * *	* *
	Frank,	*	*	* * *	* *
	Phoebe,	"	"	* * *	* *
	Polly,	"	"	twenty-three	"
54	James,	"	"	twenty-one	"
	Charity,	"	"	sixteen	"
	Die,	"	"	fifty-six	"
	Pierre,	"	"	thirty-nine	"
	Julia,	"	"	twenty-five	"
	Israel,	"	"	eighteen	"
	Offy,	"	"	fifty-seven	"
	Eliza Hunter	"	"	thirty	"
	Big Rose,	"	"	forty-one	"
	Mingo,	"	"	twenty-two	"
	Stephen,	"	"	twenty-one	"
	George,	"	"	fifty-six	"
	Dinah,	"	"	twenty-four	"
	Nancy,	"	"	twenty-three	"
	Betzey,	"	"	twenty-two	"
	George,	"	"	twenty-one	"
	Buford,	"	"	eighteen	"
	Jeffrey,	"	"	fifty-four	"
	Dolly,	"	"	forty-nine	"
	Sue,	"	"	thirty-one	"
	Felice,	"	"	fourteen	"
	Little Lee,	"	"	eight	"
	Jeff,	"	"	twenty-two	"
	Stephen,	"	"	twenty-one	"

* * * , eighteen hundred and sixty-four; nine * * * eleven thousand d. * * * , made payable resp. * * * eighteen hundred and sixty * * * and sixty-six, eighteen hundred and
60 * * * , eighteen hundred and sixty-eight, eighteen hundred and sixty-nine, eighteen hundred and seventy, eighteen hundred and seventy-one, eighteen hundred and seventy-two, and eighteen hundred and seventy-three; and one for the sum of twenty-two thousand dollars, made payable on the 1st day of May, eighteen hundred and seventy-four.

And as by the terms of this sale all of the credit portion of the said consideration represented by said notes is to bear interest at the rate of seven per cent. per annum, payable annually, and for which interest said purchaser is to furnish notes or coupons; wherefore said purchaser has hereby also furnished eleven certain interest promissory notes or coupons, all drawn by him to the order of and endorsed by himself, dated this day, and made payable for the sums and at the periods following, to wit: one for the sum of two hundred and ten dollars, payable on the first day of May next, being for interest on said note for
61 nine thousand dollars; one for the sum of eleven thousand two hundred and ninety-three dollars thirty three and one-third cents, payable on the first day of May eighteen hundred and sixty-five, being for interest on balance of principal up to that day; one for the sum of seven thousand seven hundred dollars, payable on the first day of May, eighteen hundred and sixty-six, being for interest on balance of principal up to that day; one for six thousand nine hundred and thirty dollars, payable on the first day of May, eighteen hundred and sixty-seven, being for interest on balance of principal up to that day; * * for six thousand one hundred and sixty dollars * * on the first day of May, eighteen hundred * * * ht, being for interest on bal * * * ety dollars * * * May, eighteen hundred * * * nine, being for interest on balance * * * principal up to that day; one for *for* four thousand six hundred and twenty dollars, payable on
62 the first day of May, eighteen hundred and seventy, being for interest on balance of said principal up to that day; one for three thousand * * * hundred and fifty dollars, payable on the first * * * May, eighteen hundred and seventy-one, * * * for interest on balance of said principal up * * * day; one for three thousand and eighty dollars, payable on the first day of May, eighteen hundred and seventy-two, being for interest on balance of principal up to that day; one for two thousand * * * hundred and ten dollars, payable on the first day of May, eighteen hundred and seventy-three, being for interest on balance of principal up to that day; and one for the sum of fifteen hundred * * * forty dollars, payable on the first day of May, eighteen hundred and seventy-four, being interest on the balance of said principal up to that day; all of which said eleven notes for principal and eleven notes or coupons, are made payable at the Citizens' Bank of Louisiana, in the city of New Orleans; and they all bear
63 interest from and after maturity, if not then punctually paid, at the rate of eight per cent. per annum until final payment; and all of said twenty-two promissory notes, after being by me, notary, paraphed "ne varietur," * * * identify them with this act, were delivered * * the said Henry Frellsen, who hereby acknowledges the receipt thereof, as well as of the * * * ready money.

And in order to secure the punctual * * * all of said promissory notes at * * * interest that may accrue * * * declared that * * * cially mortgage, affect * * * said plantation

herein conveyed * * * of the said vendor, his heirs, and assigns, without further subrogation, to enure * * * use and benefit of all future holders * * * promissory notes or any of them, and hereby promissing and binding himself not to alienate, deteriorate, or encumber the said * * * to the prejudice of this mortgage.

64 And as a further and additional security for the punctual payment of said promissory notes at maturity said Fairex furthermore declared, that he also does by these presents specially mortgage, affect, and hypothecate in favor of the said Frellsen, his heirs and assigns, and to enure to the use and benefit of any and all future holder or holders of said promissory notes or any of them, the following described property, to wit:

Four certain lots of ground, together with all the buildings and improvements thereon, situate in the first district of this city, in the square comprised within *within* St. Charles, Poydras, Carondelet, and Perdido streets, designated by the numbers five, twenty-three, twenty-four, and twenty-five, on a plan drawn by Hugh Grant, civil engineer, dated the fourteenth day of June, * * eighteen hundred and thirty-seven, deposited * * * record of J. B. Marks, late notary public in * * * city, on the 1st day of February, 1837; said lots * * * ground numbers 23, 24, and 25 measure each in American

65 meas * * twenty-six feet front on Carondelet street * * * hundred and seventy-five feet in depth * * * equal and parallel lines; said lots * * * twenty-three and twenty-foure were a * * * ; said Fai * * * ghteen * * * ; said lot number * * * from Gustave Miltenberger, * * * before said notary, Hahn, on the * * * of Jannary, 1857; and the said * * * number five, * * * six feet front on St. Charles street by one hundred and sixty-five feet in depth, and was acquired by purchase from James * * * , by act passed before said notary * * * , the eighth day of April, 1857.

* * * Fairex hereby promises and binds * * * not to alienate, deteriorate, or encumber * * * * * ty herein secondly mortgaged to the * * * of this mortgage, which is hereby * * * by the said Henry Frellsen.

* * * the event of the said twenty-two promissory * * * hereinbefore described, or any of them not * * * punctually paid at maturity, the said * * * , or any other holder or holders of the * * * , any of them is, and are hereby, antho * * * cause

66 the said plantation or any or * * said four lots of ground to be seized * * * under executory process to be is * * * any competent court in the parish * * * , the said Fairex hereby confessing * * t for the full amount of all or any * * * promissory notes, either for principal * * * st, as it may be necessary to sue on * * * , with all eventual interest, costs, and * * * ; and furthermore, said Fairex hereby * * * and consents that all suits that may * * * sary for the recovery of said pro * * ry notes, or any of them, may be * * * ed in any competent court in * * * leans.

* * * case the said Fairex should at * * * sell the said four lots of ground * * * them, the said Frellsen hereby * * * the cash purchase price * * * shall be sold, and to * * * amon * * * extent to cancel * * * on said four lots.

By reference to the annexed * * * of the recorder of mortgages of the * * * , dated this day, it will appear that * * * lots of ground are subject to the fol * * * encumbrances, to wit:

67 First. The * * * Fairex, granted in favor of H. W. Pa * * * secure payment of fourteen thous * * * hundred and eighty dollars * * * to twelve thousand dollars; sec. * * * one, granted by said Fairex to secure * * * of five thousand dollars, interest & * * * . 3rd. A judgment in favor of the * * * New Orleans for fifty $\frac{50}{100}$ dollars * * * . 4th. The drainage tax.

And Fairex hereby *hereby* dispenses * * * certificate from the recorder of said * * * , of St. Charles, in the name of said * * * , to show the encumbrances, if any, * * * in his name on the plantation, and * * * herein described, as is otherwise requi * * * article 3328 of the civil code of this * * * .

And Frellsen also binds him * * * pay all taxes that may be due on * * * plantation and slaves up to the first * * * of January, 1864.

* * * came and intervened Mistress * * * ful age of the * * * ex.

* * * notary that it is her wish and intention to release in
68 favor * * * llsen the property herein described from the matri * * dotal, paraphernal, and other rights, and from any claims, mortgages, or privileges * * * * * ch she is or may be entitled, whether by virtue of her marriage, * * * the said Fairex, or otherwise.

Whereupon I, the said notary, did inform the said Mrs. Fairex, verbally, apart and out of the presence and hearing of her said husband, that she had by law a legal mortgage on the property of her * * * husband:

First. For the restitution of her dower and for the reinvestment of * * * dotal property sold by her husband, and which she brought in marriage * * * ing from the celebration of the marriage.

Secondly, For the restitution and reinvestment of the dotal property by her acquired since marriage, whether by succession or * * * ation from the day the succession was opened, or the donation perfected.

Thirdly. For * * * tial presents.

Fourthly. For debts by her contracted with her said husband.

Fifthly. For the amount of her paraphernal property, alien-
69 ated by her and * * ce'ved by her said husband.

And the said Mrs. Fairex did thereupon declare unto me, notary, * * * she was fully aware of and acquainted with the nature and extent of the matrimonial * * * paraphernal and other rights and privileges thus secured to her by law, on the prop * * * of her said husband, and that availing herself of the right secured to her by the second section of an act passed by the legislature of this State, authorizing * * * es to make valid renunciations etc., approved on the twenty-seventh day of March, eight * * * hundred and thirty-five, she nevertheless did persist in her intention of renouncing not only all the rights, claims and privileges hereinbefore enumerated and described, but all others of any kind or nature whatever to which she is or may be entitled by any laws, now or heretofore in force in the State of Louisiana.

And the said Daniel Fairex being now present, aiding and
70 authorizing the said Mrs. Fairex in the execution of these presents, she, the said Mrs. Fairex, did again declare that she did and does thereby make a formal renunciation and relinquishment of all her said matrimonial, dotal, paraphernal and other rights, claims and privileges in favor of the said Frellsen, binding herself and her heirs at all times to sustain and acknowledge the validity of this renunciation.

Thus done and passed in my office, at the city of New Orleans, in the presence of Theodore P. Whitney and William H. Hunt, witnesses of lawful age, and domiciliated in this city, who hereunto sign their names together with the said parties, and me the said notary, on this thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-three.

(Original signed)

HENRY FRELLSEN.
MATILDA D. FAIREX.
WM. H. HUNT.
D. FAIREX.
T. P. WHITNEY.

HUGH MADDEN,
Not. Pub.

71 I, John Bendernagel, a notary public in and for the parish of Orleans, State of Louisiana, and legal custodian of the records of Hugh Madden, notary, deceased, duly commissioned and qualified, do hereby certify that the foregoing is a true and correct copy of what remains of the original act passed before said Madden (not., dec'd), and which is now in my custody, and that in this copy I have made use of the mark * to indicate that words or portions of words of the original act have, in the places where this mark appears, been obliterated and destroyed by fire; and I further certify that such portions of said original act were destroyed while in the office of said Madden (not., dec'd), No. 30 Camp street, in the month of January, 1865, at which time his office was consumed by fire.

In faith whereof I hereunto set my hand and seal this 2d July, A. D. 1872.

[SEAL.] (Signed) J. BENDERNAGEL,
72 *Not. Pub. & Custodian of the Records of Hugh Madden (Not. Dec'd).*

Exhibit B is transcribed at page 7 of this transcript.

Exhibit C 1.—*Annexed to finding of facts, A.*

HENRY FRELLSEN
vs.
DANIEL FAIREX.

To the hon. the seventh district court for the parish of Orleans:

On motion of P. H. Morgan and H. G. Morgan, of counsel for plaintiff, and on suggesting and showing to the court—

1st. That on or about the 19th day of May, A. D. 1869, an order of seizure and sale issued herein from this hon. court, directed to the sheriff of the parish of St. Charles [Orleans],* commanding him to seize and sell a certain sugar plantation belonging to the defendant, Daniel Fairex, in the parish of St. Charles, to satisfy plaintiff's claim against the said plantation, amounting to the sum of, say, sixteen thousand three
73 hundred and ninety $\frac{00}{100}$ dollars ($16,390 $\frac{00}{100}$), with interest and costs.

2d. That on or about the 24th day of May, 1869, upon application of the said defendant, Daniel Fairex, a suspensive appeal from the aforesaid judgment or order, returnable before the supreme court of the

* This correction made by order of court of date June 14th, 1872.

State of Louisiana, was allowed on his furnishing bond, with good and solvent security, conditioned according to law.

3d. That the aforesaid appeal-bond was signed by A. Marchand as security.

4th. That on or about the 22d day of May, A. D. 1871, the judgment appealed from was affirmed, and the appeal dismissed with ten per cent. damages, and the judgment of the supreme court was duly returned to and registered in this hon. court on the 27th November, A. D. 1871.

5th. And on further suggesting that an alias writ of seizure and sale was issued against the said property, the original having been
74 returned, and that under it the plantation and fixtures was sold by the sheriff of the parish of St. Charles, as will more fully appear from the writ and return, now made part hereof.

6th. That although the property sold herein brought the price and sum of forty thousand dollars ($40,000.00), there were some eleven other outstanding notes of nearly like amounts, and of the same series, and bearing on the same property as the notes in judgment herein; and that after deducting the sheriff's and clerk's costs and taxes from the gross amount of the purchase-money, the balance of the aforesaid forty thousand dollars had to be distributed pro rata on each of the aforesaid outstanding notes, and that the pro rata share of the notes in judgment herein being only eight thousand three hundred and twenty-one $\frac{42}{100}$ dollars ($8,321.42), there remains a balance due of eleven thousand seven hundred and three $\frac{51}{100}$ dollars ($11,703.51); to this amount add the sum of one thousand six hundred and thirty-nine dollars, being the
75 amount of damages allowed by the supreme court for frivolous appeal, and the plaintiff's claim will be found to be thirteen thousand three hundred and forty-two $\frac{51}{100}$ dollars ($13,342.51), as will be fully established on the trial of this rule.

7th. And on further suggesting to the court that pending the appeal to the supreme court Daniel Fairex, the defendant herein, departed this life, and that his executrix was made a party to the record; that his succession was duly opened in the hon. the 2d district court for the parish of Orleans, and is now under administration, rendering further proceedings against the property of the deft. impossible, even if his succession was not insolvent, which we ayer is the case:

It is ordered by the court that Alfred Marchand, surety on the appeal bond herein, do show cause on the 3d June, 1872, at 10 a. m., why he should not be condemned to pay unto the plaintiff herein the sum
76 of thirteen thousand three hundred and forty-two $\frac{51}{100}$ dollars, as aforesaid, with costs of these proceedings.

Judgment.

For reasons this day assigned in the written opinion of the court, delivered and on file, and the law and the evidence authorizing the same, it is ordered by the court that the rule filed by plaintiff on the 21st day of May, 1872, be made absolute so far as grant' the plaintiff, Henry Frellsen, a judgment in his favor and against the defendant, Alfred Marchand, for the sum of sixteen hundred and thirty-nine dollars, together with the costs of appeal herein taken to the Supreme Court, and also the costs of this rule; and for the balance of plaintiff's demand it is ordered by the court that the rule be discharged.

Judgment rendered Nov. 4th, 1873.

Judgment signed Nov. 8th, 1873.

(Signed) B. L. LYNCH,
Judge.

Exhibit C² annexed to the finding of facts. (A.)

77 To the honorable the seventh district court for the parish of Orleans:

The petition of Daniel Fairex, a resident of the parish of Orleans, respectfully represents:

That he feels aggrieved at the judgment and the order of seizure and sale issued on the 19th May, 1869, in the suit of Henry Frellsen vs. Daniel Fairex, No. 1438 of the docket of this court, and is desirous of appealing to the supreme court of the State from the same.

Wherefore he prays that a suspensive appeal be granted him on his giving bond in the sum of twenty-six thousand dollars, with good and solvent security, conditioned as the law directs, and returnable to the supreme court of the State of Louisiana on the second Monday of November, 1869, and the plaintiff and sheriff be cited.

(Signed) COTTON & LEVY,
E. T. FELLOWS,
Att'ys.

78 Let a suspensive appeal be allowed in this case as within prayed for, and according to law, upon plaintiff giving bond with good and solvent security, as the law directs; and let said appeal be made returnable to the supreme court of this State on the second Monday of November, 1869.

New Orleans, May 24th, 1869.

(Signed) T. WHARTON COLLENS,
Judge.

Know all men by these presents that we, Daniel Fairex, as principal, and A. Marchand, as surety, are held and firmly bound unto A. D. Bernoudy, cl'k 7th dist. court for the parish of Orleans, and his successors in office, executors, administrators, and assigns, in the sum of twenty-six thousand dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated in the city of New Orleans, on this 22d day of May, in the year of our Lord one thousand eight hundred and sixty-nine.

79 Whereas the above bounden Daniel Fairex this day filed a petition of appeal from a final judgment rendered against him in the suit of H. Frellsen vs. Dan'l Fairex, in the seventh district court for the parish of Orleans, on the day of :

Now, the condition of the above obligation is such that the above bound Daniel Fairex shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said A. Marchand, surety shall be liable in his place.

(Signed) A. FAIREX. [SEAL.]
A. MARCHAND. [SEAL.]

Signed, sealed, & delivered in the presence of.

Exhibit D is transcribed at page 35 of this transcript. (Receipt A.

SUIT OF HENRY FRELLSON
vs.
DANIEL FAIREX. } No. 1438.

Seventh district court, parish of Orleans.

Sale.—Property sold in above suit by the sheriff of the parish of St. Charles to Henry Frellsen for						$40,000 00	
Charges:							
Amount paid to sheriff of the parish of St. Charles for costs & charges & taxes (receipt in deed)					2,914 27		
" " for State taxes, 1871, on the property sold					1,038 88		
" " " clerk's fees of the 7th D. C., $52.60, and for sheriff's fees parish of Orleans, $11.35					63 95		
						4,013 10	
Net proceeds of sale						$35,986 90	$35,986 90

	Mortgage notes on said property sold bearing 8% interest per annum after maturity.		Face of notes at maturity.	Interest on notes from maturity to Feb'y 3d, 1872.	Amount of notes and interest.	Pro rata accrued to same out of net proceeds of sale.		Balance due on notes on 3d Feb'y, 1872.
1°	1 note dated December 31, '63, for , due May 1st, 1869		$11,000 00	$2,439 55	$13,439 55	5,584 82		$7,854 73
2°	1 " " " " " , " " " "		5,390 00	1,195 38	6,585 38	2,736 60		3,848 78
3°	1 " " " " " , " " 1st, 1870	$11,000 00						
	May 1, '70, less a credit on this note of	1,917 22						
	" " " remaining due a balance of	9,082 78	9,082 78	1,287 73	10,370 51	4,309 50		6,061 01
4°	1 note dated December 31, '63, for , due Mar 1st, 1870		4,620 00	655 02	5,275 02	2,191 83		3,083 19
5°	1 " " " " " , " " 1st, 1872		11,000 00		11,000 00	4,571 09		6,428 91
6°	1 " " " " " , " " " "		3,080 00		3,080 00	1,279 91		1,800 09
7°	1 " " " " " , " " 1st, 1873		11,000 00		11,000 00	4,571 09		6,428 91
8°	1 " " " " " , " " " "		2,310 00		2,310 00	959 95		1,250 05
9°	1 " " " " " , " " 1st, 1874		22,000 00		22,000 00	9,142 15		12,857 85
10°	1 " " " " " , " " " "		1,540 00		1,540 00	639 96		900 04
	Totals		$81,032 78	$5,747 68	$86,600 46	$35,986 90	$35,986 90	$50 613 56

81 *Judgment.—Extract from minutes June 4th, 1879.*

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 7986.

The parties in this case having heretofore waived the intervention of a jury, and submitted the cause to the court upon the issues of facts as well as of law, and the court having considered the evidence and arguments of counsel, and being fully advised in the premises, finds as matter of fact and as conclusion of law what is contained in the paper marked A, this day filed of record, and to form a part of the same for all purposes; and it being found that the plaintiff has established his claim as set forth therein, it is ordered, adjudged, and decreed that the said plaintiff, Henry Frellsen, do have and recover from the defendant, Alfred Marchand, the sum of eighty-five hundred and ninety-five $\frac{13}{100}$ ($8,595$\frac{13}{100}$) dollars, with interest thereon at the rate of eight per cent. per annum from the 3d day of February, 1872, until paid,
82 five hundred ($500.00) dollars, as damages allowed by the supreme court of the State of Louisiana for a frivolous appeal, and the costs of suit.

Rule for new trial.—Filed June 5th, 1879.

U. S. circuit court.

HENRY FRELLSEN
vs.
DANIEL FAIREX. } No. 7986.

On motion of Hornor & Benedict, att'ys for Alfred Marchand, it is ordered that plaintiff do show cause on the 5th day of June, 1879, why a new trial should not be granted in this case, on the grounds following, namely:

First. That the judgment is clearly contrary to the law and evidence.

Second. That the evidence shows that the judgment appealed from in the fifth district court had been satisfied by sale of the prop-
83 erty in question, in a suit in another court by the same plaintiff, against the same defendant on notes bearing concurrent mortgage with those sued upon in the fifth district court.

Third. That by reason of said sale under the writ in the seventh district court, the proceedings in both courts being proceedings in rem, said sale having been made anterior to any decree by the supreme court on the appeal on bond for which the defendant in the rule was surety, the said supreme court had become divested of jurisdiction, there being no res before it, and no personal appearance having been made by the defendant in writ, principal on the bond, or by said surety.

Fourth. That by reason of said sale of the property under the writ from the seventh district court the plaintiff therein, being the plaintiff herein, under the same mortgage, against the same property, and the same defendant, he had placed it out of his power to subrogate
84 defendant herein, surety on the bond in the fifth district court, to the rights and actions he, the said plaintiff, had to subrogation against the defendant Fairex, principal on the bond; and therefore the said surety was released.

Fifth. That the sale of the property in question for cash, instead of

on terms of cash and credit as required by the notes and the law, operated to the injury of the surety, and released him from any responsibility, if any existed.

Sixth. That the court erred in holding the surety, on proceedings in rem, to a greater extent, and under more onerous conditions than his principal.

Seventh. That the court erred in not construing the bond with reference to the judgment appealed from to its terms, and to the law under which it was made.

Eighth. That the court erred in its conclusion of law on the facts found.

Ninth. That the court erred in condemning defendant to pay
85 the pro rata claimed to be due on the notes sued upon in the seventh district court, as the said defendant's liability thereon had been adjudged in said court, and paid.

Order.—Rule discharged.—Extract from the minutes of June 5th, 1879.

HENRY FRELLSEN
vs. } No. 7986.
DANIEL FAIREX.

On motion of Hornor & Benedict, attorneys for A. Marchand, it is ordered that plaintiff do show cause on 5th June, 1879, at 11 a. m., why a new trial should not be granted on the grounds filed.

And the rule being submitted, it was ordered that the same be discharged, and a new trial refused.

And thereupon, the delay for the signing of the judgment was waived by the attorneys for the defendant.

Judgment.—Extract from judgment book.

86 Circuit court of the United States, fifth circuit & district of Louisiana. April term, 1879.

NEW ORLEANS, *Wednesday, June 4th*, 1879.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

HENRY FRELLSEN
vs. } No. 7986.
DANIEL FAIREX.

The parties in this cause having heretofore waived the intervention of a jury, and submitted the cause to the court upon the issues of fact as well as of law, and the court having considered the evidence and arguments of counsel, and being fully advised in the premises, finds as matter of fact, and as conclusion of law, what is contained in the paper marked A, this day filed of record, and to form a part of the same for all purposes; and it being found that the plaintiff has established his claim as set forth therein:

It is ordered, adjudged, and decreed that the said plaintiff,
87 Henry Frellsen, do have and recover from the defendant, Alfred Marchand, the sum of eighty-five hundred and ninety-five $\frac{13}{100}$ ($8,595 $\frac{13}{100}$) dollars, with interest thereon at the rate of eight per cent.

per annum from 3d day of February, 1872, until paid; five hundred ($500.00) dollars, as damages allowed by the supreme court of the State of Louisiana for a frivolous appeal, and the costs of suit.

Petition & order for writ of error.—Filed June 6th, 1879.

U. S. circuit court, district of Louisiana.

ALFRED MARCHAND *vs.* HENRY FRELLSON. } No. 7986.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of Alfred Marchand, defendant herein, with respect, represents that he is aggrieved by the final judgment rendered
88 against him in the case of Henry Frellsen vs. Daniel Fairex, No. 7986 on the docket of this honorable court, on 4th June, 1879, and signed on the 4th June, 1879.

Wherefore petitioner prays that he may be allowed a writ of error to the Supreme Court of the United States at Washington City, returnable into said Supreme Court at its next session to be holden on the second Monday of October, in the year 1879, and that said writ of error may operate as a supersedeas, on petitioner executing and filing a bond with good and sufficient surety in the sum of twenty thousand dollars; and that the said plaintiff, Henry Frellsen, be cited to appear in said Supreme Court of the United States on the second Monday of October, 1879, to answer to the said writ of error; and he prays for all general relief.

(Signed) HORNOR & BENEDICT,
Att'ys.

A writ of error, to operate as supersedeas, is allowed in this case as prayed for, and according to law, returnable to the Supreme Court of the United States on the second Monday of October, 1879,
89 the petitioner giving bond in the sum of twenty thousand dollars, with good and solvent security, conditioned as the law directs.

New Orleans, June 6th, 1869.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for writ of error.—Filed June 6th, 1879.

Know all men by these presents that we, Alfred Marchand, as principal, and Joseph P. Hornor, as surety, are held and firmly bound unto Henry Frellsen and Frank A. Woolfley, clerk of the U. S. circuit court for the district of Louisiana, in the full sum of twenty thousand ($20,000.00) dollars, to be paid to the said Henry Frellsen or said F. A. Woolfley, clerk, &c., or either of them, or his or their certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this sixth day of June, in the year of our Lord one
90 thousand eight hundred and seventy-nine.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a

suit depending in said circuit court, wherein Henry Frellsen was plaintiff and Alfred Marchand was defendant, judgment was rendered against the said Alfred Marchand, defendant, and the said Alfred Marchand having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry Frellsen, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Alfred Marchand shall prosecute his writ to effect and answer all damages and costs if he fails to make his plea good, then the above
91 obligation to be void; else to remain in full force and virtue.

(Signed) ALFRED MARCHAND, [SEAL.]
By his att'y, W. S. BENEDICT.
JOSEPH P. HORNOR. [SEAL.]

Sealed & delivered in the presence of—

Bond approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

92 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 91 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Henry Frellsen vs. Daniel Fairex, No. 7986 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 15th day of August, A. D. 1879.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 15th day of August, A. D. 1879.

EDWARD C. BILLINGS, *Judge.*

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Henry Frellson, plaintiff, and defendant in error, & Alfred

Marchand, defendant & plaintiff in error, a manifest error hath happened, to the great damage of the said Alfred Marchand, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the said Supreme Court of the United States, this 6th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 7986. Alfred Marchand, plaintiff in error, vs. Henry Frellson, defendant in error. Writ of error. Hornor & Benedict, attorney of plaintiff in error. Filed June 6th, 1879. F. B. Vinot, d'y clerk.

94 UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Henry Frellson of the district of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Alfred Marchand is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Alfred Marchand, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

EDWARD C. BILLINGS,
Judge.

95 (Indorsed:) United States circuit court. No. 7986. Alfred Marchand vs. Henry Frellson. Citation.

Marshal's return.

Received Jun. 6, 1879, by the U. S. marshal, and on June 7th, 1879, I served a true copy of the within citation of error on Henry Frellson, defendant in error, by handing the same to him in person in the city of New Orleans, district of Louisiana.

E. S. CURRY,
D'y U. S. Marshal, District of Louisiana.

On the 9th day of June, 1879, personally appeared before me E. S. Curry, a deputy United States marshal for the district of Louisiana, and make oath that he served a true copy of the within citation of error on Henry Frellson, defendant in error, as stated in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal, Dist. of Louisiana.

Sworn to and subscribed before me this 9th day of June, 1879.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 812. Alfred Marchand, plaintiff in error, vs. Henry Frellsen. Louisiana circuit court of the United States. Filed 1st September, 1879.

IN THE

Supreme Court of the United States.

October Term, 1879.

ALFRED MARCHAND,
PLAINTIFF IN ERROR,
vs.
HENRY FRELLSEN.

No. 812.

Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

This action is *in form* a rule to show cause taken by Frellsen against Marchand, to hold him liable as surety on an appeal-bond, filed in the State courts of Louisiana, in which one Daniel Fairex was the appellant. *In substance*, it is an action at law, "Debt on bond;" and was transferred to the United States circuit court by Marchand, who is a citizen of France. Judgment was rendered against Marchand, who has resorted to the present writ of error. The case was tried without a jury.

HISTORY OF THE CASE.

December 31, 1863. Frellsen sold to Daniel Fairex a

sugar plantation, Parish St. Charles, Louisiana, together with over 150 slaves, for $133,000, of which $3,000 was paid in cash, and the balance in eleven notes, each accompanied by an interest note, making twenty-two notes, numbered and lettered for convenience as follows:

No. 1.	Note due 1st May, 1864..		$9,000 00
	A. Interest note.....	$210 00	
" 2.	Note due 1st May, 1865..		11,000 00
	B. Interest note.....	11,293 33⅓	
" 3.	Note due 1st May, 1866..		11,000 00
	C. Interest note.....	7,700 00	
" 4.	Note due 1st May, 1867..		11,000 00
	D. Interest note.....	6,930 00	
" 5.	Note due 1st May, 1868..		11,000 00
	E. Interest note.....	6,160 00	
" 6.	Note due 1st May, 1869..		11,000 00
	F. Interest note.....	5,390 00	
" 7.	Note due 1st May, 1870..		11,000 00
	G. Interest note.....	4,620 00	
" 8.	Note due 1st May, 1871..		11,000 00
	H. Interest note.....	3,850 00	
" 9.	Note due 1st May, 1872..		11,000 00
	I. Interest note.....	3,080 00	
" 10.	Note due 1st May, 1873..		11,000 00
	K. Interest note.....	2,310 00	
" 11.	Note due 1st May, 1874..		22,000 00
	L. Interest note.....	1,540 00	
		$53,083 33	$130,000 00
	Total amount of interest notes.....		53,083 33
	Total amount of principal and interest..		$183,083 33

On May 18, 1870, Frellsen obtained an order of seizure

and sale from the fifth district court of New Orleans for an unpaid portion of the price of said plantation and slaves, as follows:

Balance due on note maturing May 1, 1870, No. 7		$11,000	00
Less credit on the same		1,917	22
		$9,082	78
G. Interest note on same	$4,620		
No. 9. Note maturing May 1, 1872.		11,000	00
I. Interest note on same	3,080		
No. 10. Note maturing May 1, 1873.		11,000	00
K. Interest note on same	2,310		
No. 11. Note maturing May 1, 1874.		22,000	00
L. Interest note on same	1,540		
	$11,550	$53,082	78

It thus appears that on the 31st December, 1863, Frellsen sold the plantation and shares to Fairex for cash and notes for the price and sum of $133,000, and for notes bearing interest on the principal-notes of $53,083.33, making a total of $186,083.33, reserving his vendor's privilege on the objects sold, and farther secured by a special mortgage upon real estate in New Orleans. Of this amount of $186,083.33, he received, from the date of sale to the date of the institution of his suit, the sum of $121,450.55, leaving a balance due of $64,632.78.

This was, then, all that Frellsen claimed. A profound silence was preserved as to the fast maturity of two other notes, amounting to $16,390, *involved in a prior suit in seventh district court*, numbered 6 and lettered F.

May 26, 1870. From this order of seizure and sale Fairex appealed suspensively, bond in $23,000, with Alfred Marchand as surety. The bond is on record, page 3, and is the copy marked Exhibit B, in the findings first and second on pages 17 and 18 of the record.

January 19, 1874. The supreme court of Louisiana dismissed the appeal, with $500 as damages for a frivolous appeal.

Record, p. 3, at foot; Third finding, p. 18.

It is on this particular bond for $23,000 that these proceedings rest.

See Record, pp. 1, 2, 3.

August 26, 1871. Pending this appeal, *i. e.*, from the 5th district court of New Orleans to the supreme court of Louisiana, Fairex died.

November 28, 1871. Frellsen obtained an *alias* order of seizure and sale against the same property for another portion of the unpaid purchase-money, to wit:

No. 6. Note maturing May 1, 1869	$11,000
F. Interest note on same	5,390
	$16,390

This *alias* order of seizure and sale for $16,390 was preceded by an *original* order of seizure and sale issued by the seventh district court of New Orleans on May 19, 1869, (see Record, p. 29,) from which original order Fairex had also appealed, giving bond, with Marchand as security, in $26,000. This appeal resulted in damages for frivolity—ten per cent. on the amount of principal and interest, ($16,390, as aforesaid.) Under this *alias* writ the mortgaged property was finally sold to Henry Frellsen, *the original vendor*, for $40,000, on February 3, 1872.

Fourth finding, p. 18; bond, p. 29. See also pp. 10, 11.

May 21, 1872. In this same seventh district court of New Orleans, after the sale, proceedings by rule for the

same purpose as in the present case, *i. e.*, to make Marchand, the security, legally liable *for the decline in value of the property pending the appeal*, resulted in a judgment against him for the damages for a frivolous appeal decreed by supreme court of Louisiana, $1,639, with costs of appeal and costs of the rule; and the rule was discharged for the balance of plaintiff's demand, ($11,073.51.)

See the rule and judgment thereon, Record, pp. 27, 28.
See the sixth finding, Record, pp. 18. 19.

December 3, 1873. Henry Frellsen acquiesced in this judgment, abandoned his appeal from it, and gave full satisfaction therefor, on payment to him of the amount thereof, say $1,900.

Record, p. 15, *Receipt.*

May 8, 1876. Henry Frellsen enters the present rule against Marchand, claiming $9,144$\frac{21}{100}$ *for decline in value pending the appeal*, with $500 damages as for a frivolous appeal awarded by supreme court of Louisiana.

March 20, 1877. Marchand answers, admitting his signature to the bond, (p. 3,) but denying all liability thereunder. He also pleads an estoppel; that Frellsen by his acts [selling the property under the *alias* writ, *etc.*, *etc.*] had prevented Marchand and Fairex from *executing* the present judgment; that Frellsen could no longer subrogate the surety, Marchand, who, if any liability existed, which is denied, has been thereby released.

See answer in full, Record, page 6, at top.

March 21, 1879. Judgment for plaintiff, $9,144.20, with interest, and $500 damages as allowed by the supreme court of Louisiana for a frivolous appeal and all costs.

Record, p. 8.

The case was then referred to a master to fix the *pro rata* to be credited Marchand.

April 19, 1879. Master's report is filed.

Record, pp. 8, 9, 10, and 11.

April 14, 1879. Marchand excepts to the report, which is sustained, for $1,038.88, and the judgment final in favor of Frellsen for $8,595.13, with interest and costs, and $500 damages as aforesaid for the frivolous appeal.

Record, pp. 15, 16, 17, 18, 19.

From this judgment recourse has been had to the present writ of error.

Assignment of Errors.

The lower court erred—

First. In finding any liability whatever in Marchand as security to Frellsen on the appeal-bond in question.

Second. In sustaining any part of the master's report.

Third. In not sustaining the objection made to the master's report that no *pro rata* could be allowed on the two notes due May 1, 1869, one for $11,000 and one for $5,390, because the same had been paid, settled, and compromised, as evidenced by Frellsen's receipt.

Fourth. In holding that Marchand was liable to Frellsen for any depreciation in the value of the real property and slaves pending the appeal in the supreme court of Louisiana.

Fifth. In not sustaining the estoppel pleaded by Marchand on the facts of the case as found by the court.

ARGUMENT.

Two main questions are presented for solution:

First. What is the extent of the liability of a surety on an appeal-bond to the supreme court of Louisiana in the case of an order of seizure and sale rendered by a district court of the city of New Orleans?

Second. Was the surety discharged from liability by the acts and doings of the creditor in this case?

I.

An order of seizure and sale, given by a Louisiana judge, is regarded in national jurisprudence as precisely equipollent to a decree of foreclosure of mortgage and sale of the property made by a chancellor.

Marin *vs.* Lally, 17 Wall., 14, and cases cited.

On an appeal from such an order or decree of foreclosure and sale, the liability of the surety on a *supersedeas* bond in the United States courts has been well settled, ever since the judiciary act of 1789. The elements of this liability are:

1st. The use and detention of the property; 2d. Costs of suit; 3d. Just damages for delay; 4th. Costs and interest on the appeal. All exercise of the judicial power *outside* and *beyond* these elements or factors of damage, would be simply arbitrary and punitive.

See Rules and Orders, 1st Cranch XVII, No. 7.
See present Rule of this Court, No. 29.
See the Recognizance on Appeal to House of Lords, Daniels' Chancery Practice, p. 1639, and the remarks in Jerome *vs.* McCarter, 21 Wallace, 28, *et seq.*

The distinction between a judgment for a certain sum of money and a judgment for the delivery of movable and immovable property is radical and visceral.

Hence, if all these proceedings, detailed in the findings of the court, had been had in a circuit court of the United States, the liability of Marchand would be rigorously determinable on the principles stated.

II.

The laws of Louisiana procedure recognize specially the distinction between judgments for the payment of money and judgments for the delivery of property. The Code of Practice, Article 577, reads: "But if the judgment decree "the delivery of real-estate, not of a perishable nature, "security shall only be required to an amount exceeding "by one-half the estimative value of the revenue to be "derived from such real-estate pending the suit, and for "such further amount as the judge may determine as "surety for an injury, or a deterioration which may be "caused to the estate *by the appellant* while in possession "of the same."

The judgment in all cases of seizure and sale is invariably: "Let executory process issue as prayed for and ac- "cording to law."

See Marin *vs.* Lally, 21 Wall., p. 15.

This executory process forms an entire chapter (VII) of the Code of Practice. It is a branch of the hypothecary action. Article 61, C. P., reads: "An hypothecary action "is a real action, which the creditor brings *against the* "*property which has been hypothecated to him* by his "debtor, in order to have it seized and sold for the pay- "ment of his debt."

Article 63: "When the hypothecated property is in the "hands of the debtor, and when the creditor, besides his "hypothecary right, has against his debtor *a title import-* "*ing a confession of judgment*, he shall be entitled to "have the hypothecated property *seized immediately*, and "sold for the payment of his debt, including the capital, "the interest, and the costs, pursuant to the rules provided "hereafter for executory proceedings."

It is beyond all doubt, therefore, that an order of seizure and sale is directed against the real property hypothecated, decreeing the delivery thereof to the sheriff, from which order a suspensive appeal lies to the supreme court of Louisiana, upon giving the bond provided for by the Article 577, C. P., above quoted.

Harrod *vs.* Voorhies, 16 La., (Miller,) 256, *et passim.*

And, under this article determining the limits of liability of the security on the appeal bond, no doubt can reasonably exist as to the elements constitutive, as well as regulative, of the damages. The *positive* law of the State fixing the surety's liability would necessarily overrule any illegal and additional condition which might be inserted in the bond.

Baker *vs.* Morrison, 4 La. An., 372, *et passim.*
U. S. *vs.* Bradley, 10 Peters, 343.

Louisiana Code, 1870, Article 3037: "The effects of ju- "dicial suretyship are determined in the laws regulating "judicial proceedings."

The rule that as one binds himself he shall remain bound may be true in mere conventional obligations; but the effect of judicial bonds must be tested by the law directing them to be taken.

That which is superadded must be rejected, and that which is omitted must be supplied.

So if there be no law authorizing such a bond to be taken, or if the prerequisites required for the taking thereof be not fulfilled, the bond will not bind; *there is error, and the consideration fails.*

Denys *vs.* Armitage, 5 Martin, 629.
Boswell *vs.* Lainhart, 2 La., (Miller,) 398.
Slocomb *vs.* Robert, 16 La., (Miller,) 173–188.
Welsh *vs.* Barrow, 9 Rob., 535.
Sears *vs.* Bearsh, 7 Annual, 539.
King *vs.* Baker, 7 Annual, 570.
Mason *vs.* Fuller, 12 Annual, 68.

The contrasted doctrine to the above is;—that there are no such distinctions in judgments as those we have above alluded to; that the order for a seizure and sale is a virtual judgment *for the amount of money* claimed by the petitioner; that the defendant, by his authentic act of purchase, imports a confession of judgment; and consequently, where the defendant appeals from such order he must give bond and security *absolutely* for the *payment of the amount claimed* in the petition asking for the writ. These are the principles on which the case seems to have been decided. The action on the mortgage has been identified with the action on the notes secured by the mortgage; the *viâ executirâ* with the *viâ ordinariâ;* in the special pleadings of the common lawyers, it is the identification of "*Sci. Fa.* "*sur* mortgage" with "debt on bond."

It is also plain that Frellsen had a right of action in case of non-payment at maturity against his vendee, Fairex-on *each one* of the eleven notes given for the principal and on *each one* of the eleven notes given for the interest, inasmuch as he appears never to have parted with any of them

to a third person. But it is equally clear that the mortgage given by Fairex on the plantation and slaves was *indivisible* in its nature.

L. C. of 1870, art. 3282. The mortgage "is *in its nature* "*indivisible*, and prevails *over all the immovables subject to it, and over each and every portion.*" Of necessity, therefore, there can be *but one* hypothecary action upon the mortgage resting on the plantation and slaves in favor of Frellsen. And no matter how many different orders of seizure and sale he might obtain on application to the various seven district courts of New Orleans, but *one single sale* by the sheriff could be made under *any one* or *all* of these orders, and this *one* sale would certainly extinguish (merge) the mortgage.

Frellsen began his *first* hypothecary action in the seventh district court on note No. 6 and the interest note G, both maturing May 1, 1869; and pending a *suspensive* appeal, entered *another* hypothecary action on the same identical mortgage in the fifth district court. This seems to have been overlooked both by the fifth district court and the supreme court. It was an illegal and an oppressive act on Frellsen's part. In the statement of facts (Record, p. 18) the lower court says "that the rule taken in the "seventh district court case was in a suspensive appeal "from an executory order or judgment granted on notes "entirely distinct from the notes sued on in the case be-"fore the fifth district court, *except that said notes were* "*all secured by one mortgage and held by Henry Frellsen* "*on the property sold.*" But both actions together form but the same action on the same mortgage and between the same parties. Indeed, had the hypothecary action in the fifth district court been instituted by a third person, then this third person would have been a trustee for Frellsen so far as Frellsen's interests were involved, whilst in the

The allegation on which this liability is based reads: "And, finally, they further suggest that at and about the "time said suspensive appeal [from the fifth district court] "was taken the property subject to the executory judg- "ment was well worth $110,000, and could have been sold "for sufficient to pay in full the claims and judgment of "said Henry Frellsen."

Record, page 2.

But, *Firstly.* There is no explicit finding of this fact by the lower judge.

Secondly. The damages are not only too remote, but never entered into the contemplation of the parties, and could not be foreseen.

Thirdly. These damages are not embraced expressly or tacitly in the bond.

Fourthly. They have not been "*caused by the appellant.*"

See the article 577, Code of Practice, before quoted.

If Marchand was in law security for the payment of money by Fairex, which we deny, and liable in law for the depreciation in the value of the property *pro rata* as determined by the lower court, then he would be entitled to set off the *pro rata* of the amount realized by Frellsen on some of the most valuable properties in the city of New Orleans, specially mortgaged by Fairex "as a farther and "additional security for the punctual payment of said "promissory notes at maturity," * * * "and to enure "to the use and benefit of any and all future holders of "said promissory notes or any of them."

See act of sale, on Record, p. 25, at top.

Under this hypothesis of Marchand's liability to pay Fairex's debt, only two categories are possible, *viz :* either this collateral mortgaged property has not yet been sold, and in this event there has been no liquidation of Fairex's indebtedness as principal; or it has been sold and not accounted for. In either event, the action against Marchand is premature and cannot be sustained. (La. Code, 1870, art. 3066.) "A judicial surety cannot demand the dis-"cussion of the property of the principal debtor."

"But no suit shall be instituted against any surety on "any appeal-bond * * * until the necessary steps "have been taken to enforce payment against the prin-"cipal."

IV.

The plea in bar raises the second main question in the case: Was the security, Marchand, discharged from liability by the acts and doings of the creditor in this case?

La. Code, 1870, article 3061. "The security is discharged "when, by the act of the creditor, the subrogation to his "rights, mortgages, and privileges can no longer be oper-"ated in favor of the surety."

Under this branch of the case our position is that, from the proceedings in the seventh district court, all the damages due from principal and security to Frellsen have been settled, compromised, and paid, December 3, 1873, some two years and five months before this rule to show cause was filed, and before the supreme court of Louisiana had passed upon the second appeal from fifth district court; consequently, Frellsen could no longer subrogate Marchand to his rights against Fairex.

It is impossible for us to set forth the point involved in more clear and unequivocal language than that used by Marchand's counsel in the court below, and to which, on

Record, p. 6, we respectfully ask your Honors to refer. If the judgment, ordering a seizure and sale, of the fifth district court, and the judgment of the supreme court of Louisiana thereon, could not be executed on account of its active prevention by Frellsen himself, then Frellsen is estopped from proceeding against Marchand. And even if the doctrine of liability for *decline in value* be true, or if Marchand has incurred any liability in signing the appeal-bond to pay any portion of the debt due by Fairex to Marchand, which is expressly denied, then, from the impossibility on Frellsen's part to subrogate, on payment by Marchand, to any of his original mortgage-rights, (the same having been merged and extinguished by the sale,) Marchand is discharged.

This point is susceptible of much enlargement in its development, but if the proceedings in fifth district court be null *ab initio*, this becomes unnecessary.

V.

And the same remark applies to the third assignment of error. The receipt by the creditor estops him most clearly from reviving a judgment in which he has clearly acquiesced, and re-establishing an appeal which he has abandoned.

After signing that receipt and receiving the $1,900, and abandoning his appeal, on plain principles of law he was forever barred from claiming any damages for *decline in value* pending the appeal either against Fairex or Marchand. *Res judicata per veritate accipitur.* The judgment of the seventh district court is conclusive, and the present rule to show cause a manifest afterthought.

VI.

This afterthought is founded on two recent decisions of the supreme court of Louisiana in—

Whan *vs.* Irwin, 27 La. An., 706.
Landry *vs.* Victor, 30 La. An., 1041.

But in Louisiana jurisprudence the *stare decisis* doctrine has but a limited *locus standi.* The decisions of her supreme court, even when unanimous, are by no means matters of faith for the subordinate judges, but rather arguments for instruction and enlightenment. Her law is *positive* in her statutes and codes and constitution. In these her law exists and is. It may be found *sometimes* in her supreme court decisions, *but not always.* So, in the present case, we deny that these decisions declare the law of Louisiana. We assert, on behalf of our client, exactly what the English judges said of one of the decisions of the Louisiana supreme court: "It is the application of the "law * * * which renders, *not the law itself*, but the "decisions of the courts of Louisiana upon it, open to the "reproach of injustice."

Marine Credit Co. *vs.* Hunter, L. R. 3, ch. 482.

The above decisions were preceded by many more than two others, and of a *directly antagonistic nature*, and which are referred to in the dissenting opinions. We may add to what has already been said on the disputed doctrine of these recent cases, that they all lose sight of the distinction between a *quantum damnificatus* and a *quantum indebitatus.*

See Baker *vs.* Morrison, 4 Annual, 372, before quoted.

But even if these Louisiana decisions should be followed in this court, we contend they are inapplicable to this case, because the order of seizure and sale here was null and void from the beginning. The appeal from the first order, the affirmance of the *quasi* judgment decreeing it to issue, the sale made under the *alias* writ, the proceedings against the security and his payment of the judgment against him, exhausted Frellsen's claim for damages. After that, subrogation on the part of the creditor was no longer possible. The quoted cases, even if good law, could only be applied to the proceedings in the seventh district court, but not to the fifth. Admitting the final sale of the mortgaged property to be good and valid in law, it certainly extinguished the mortgage altogether, and the sheriff's deed, as well as his return on the writ of seizure and sale, when duly recorded, nay, his simple adjudication of the property to the bidder at the judicial sale, "has, of itself "alone, the effect of transferring to the purchaser (Frell-"sen) all the rights and claims which the party (Fairex) "in whose hands it was seized might have had to the thing "adjudged."

La. Code of Practice, Art. 690.

It is impossible to see how Frellsen could *subrogate* Marchand to any right of mortgage upon *his own* property. Either the right of the surety to his subrogation, or the right of Frellsen to succeed herein, must be denied.

We pray your Honors to reverse the judgment.

DURANT & HORNOR,
Attorneys for Plff. in Error.

WASHINGTON, D. C., *Dec.* 26, 1879.

OFFICE SUPREME COURT U. S.
FILED
MAR 17 1882
JAMES H. McKEN

IN THE

UNITED STATES SUPREME COURT.

ALFRED MARCHAND
vs.
HENRY FRELLSON.

No. 236.

Brief of P. Phillips and W. Hallett Phillips for Defendant in Error.

P. PHILLIPS,
W. HALLETT PHILLIPS,
For Defendant in Error.

January 9th, 1882.

R. O. POLKINHORN, PRINTER.

"That the above bounden D. Fairex shall prosecute this appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real and personal, if he be cast in the appeal; otherwise the said Marchand shall be liable in his place."

"This condition strictly conforms to the provisions of Article 579 of the Code of Practice.

The judgment in the 5th District Court was rendered 18 May, '70, and affirmed by the Supreme Court in 1874, with $500 damages, as for a frivolous appeal.

While the appeal in this case was pending, Frelson obtained an alias writ of seizure and sale on the affirmed judgment of the 7th District Court, under which the mortgaged premises were sold to the plaintiff for the sum of $40,000 cash—which was distributed *pro rata* on all the concurrent notes of the mortgage.

In 1876, in the 5th District Court, Marchand was served with a rule to hold him liable for what was due on the judgment of that court, after crediting it with the *pro rata*.

On the filing of this rule Marchand gave bond, and had the same removed for trial to the Circuit Court of the United States for the 5th Circuit and District of Louisiana.

In the Circuit Court a jury was waived, and the case was submitted to the decision of the Judge.

On the facts found (p. 18), the Court gave judgment for $8,595.13, ~~two~~ five hundred dollars damages allowed by Supreme Court for a frivolous appeal, and the costs of suit. p. 32.

All that the Court had to do was to ascertain whether the concurrent notes had received their *pro rata* of the net proceeds of sale, and this has been affirmatively determined.

The Court is now asked to reverse the judgment of the Circuit Court—which is based upon the validity of the judicial proceedings in the State courts.

It is argued by counsel that the "appeal from the order of seizure and sale rendered by the 5th District Court, in respect to the supersedeas-bond, * * never had any operation, either in law or fact."

In our view," say the counsel, "all the proceedings in the 7th District Court were regular and legal, whilst all those in the 5th District Court were null and void."

In the present era of our jurisprudence, it is certainly a bold proposition that the judgment of a court possessing full jurisdiction of the cause can be impeached in a collateral proceeding.

But the proposition is still bolder when we learn the ground upon which the learned counsel asserts the nullity of the judgment.

"It is null and void (says he) on account of the error produced in the minds of the judges of the Supreme Court and the 5th District Court by the action of Frellson in withholding from them knowledge of the pendency of the suit in the 7th District Court." p. 12.

No one had fuller knowledge of the pendency of that suit than Fairex himself, the defendant. Marchand had equal knowledge of it, for he was surety on the appeal-bond.

When Fairex applied for an appeal from the judgment of the 5th District Court, with full knowledge of the pendency of the suit in the 7th District, he alleges as his ground of appeal—that it appeared, "from the face of the papers, that the mortgaged notes were given for slaves and cannot be executed." p. 2.

In the judgment of affirmance rendered in 1874, more than three years subsequent to the appeal, the Court say: "The only question presented is, does the evidence authorize the issuing of the order? We think it clearly does"—and the appeal is dismissed with damages.

As Fairex is conclusively bound by this judgment, Marchand, his surety, can claim no exemption from liability, based upon its invalidity. His bond stipulates that if Fairex did not satisfy the judgment to be rendered against him, he, the surety, would be liable in his place.

It is objected that the Circuit Judge erred in considering the decline of the value of the property, pending the appeal, as an element in fixing the liability of the surety on the appeal-bond.

This statement is several times repeated; and it is only necessary to say that the findings of facts on which the judgment was rendered makes no reference to such an element.

It is, again, urged that the surety is only liable "for the use and detention of the property, damages for delay, and costs and interest." p. 7.

To sustain this proposition, counsel cites the rules and decisions of this Court and of the English Chancery.

The true inquiry is—what is the law of Louisiana, under which this bond was executed? By this alone is the surety's liability to be ascertained.

In *Whan* vs. *Irwin*, 27 An., 706, decided in 1875, the Court say:

"It is contended that the proceeding against the surety was premature—as only the property mortgaged had been sold under the writ, and no execution had been issued against the judgment-debtor and returned *nulla bona*. If

this proposition be correct, to require a bond for an appeal from an order of seizure and sale is an idle form.

"Article 575 of the Code of Practice and Section 37 of the Revised Statutes of 1871 justify the mode of proceeding in this case. The only execution which it was possible for the judgment-creditor to cause to be issued was issued, and returned not satisfied. The requirements of the law were substantially complied with. The surety knew that, under the executory process, no other property could be sold except that which was included in the mortgage—and when he stopped that by signing the appeal-bond, *he obligated himself to pay the amount of the judgment for which the writ had issued, if affirmed on appeal.*

"By reason of the nature of the judgment, no execution could be taken out—after the return of the order of seizure and sale—which could reach the property of the debtor, and therefore the plaintiff had the right to proceed immediately against the surety on the appeal-bond. A different interpretation of the law would make of judicial suretyship a mere farce—the commencement, rather than the end, of litigation."

This is affirmed in *Landry* vs. *Victor*, 30 An., 1041 (decided in 1878).

The learned counsel thus assails these adjudications:

"In Louisiana jurisprudence the *stare decisis* doctrine has but a limited *locus standi*. The decisions of her Supreme Court, even when unanimous, are by no means matters of faith for the subordinate judges, but rather arguments for instruction and enlightenment. Her law is positive in her statutes and codes and constitution. In these her law exists and is. It may be found *sometimes* in her Supreme Court decisions, *but not always*. So, in the present case, *we deny that these decisions declare the law of Louisiana.*" p. 17.

This proposition is no less novel than the one which maintains that the judgment of the Fifth District Court, affirmed in the Supreme Court, can be held in this proceeding to be null and void. Under any system of jurisprudence, the decisions of the court of last resort must be held binding until they are reversed.

Under our system, by act of Congress, the laws of the State constitute the rule of decision; the construction of those laws given by the highest court of appeal becomes a part thereof, and are obligatory upon the Federal tribunals.

So that, to give any countenance to the proposition of the learned counsel, he must show that the act of Congress has no application to the State of Louisiana—owing to the fact that there the doctrine of *stare decisis* has but a limited *locus standi.*

Finally, it is objected that the payment by Marchand of the sum of $1,900, and the receipt given by Frellson, which forms a part of the findings, was an extinguishment of the judgment for $16,390, with $1639 damages, rendered in the Seventh District Court, not only as to him, but that it equally operated as payment of the notes on which it was rendered, so as to deprive them of their *pro rata* of the proceeds of sale, and thus increase the *pro rata* on the notes, the subject of the present suit; that is, the receipt for $1,900 discharged Marchand from his collateral obligation as surety on the bond, and also discharged Fairex, the defendant in the judgment, from all liability thereunder.

After the affirmance of the judgment of the 7th District Court, a rule was taken against the surety to hold him liable for the amount due on that judgment, after it had been credited by the sheriff with the *pro rata* of the proceeds of the sale. This distribution was made February, 1872. The settlement referred to above was on 3 December, 1873, a year after the *pro rata* was made. The receipt itself shows that the $1,900 was received from Marchand as a settlement of the *demand against him as surety.* p. 15.

The Court finds that the damages of $1639, with interest and costs, as awarded by the Court, amounted to the sum of $1900.

While, therefore, Marchand was acquitted from responsibility as surety on this appeal by paying the damages allowed for a frivolous appeal, the judgment as against Fairex for the sum due on the notes remained in full force.

Assuming that Marchand can stand on the same right with Fairex in demanding that a proper *pro rata* should be made on the concurrent notes, this is fully established in the sixth finding, as follows:

"The proceedings in the 7th District Court on said bond were on an obligation entirely distinct from the proceeding on the obligation sued on in the case at bar, and the notes sued out in said cause received a *pro rata* of the proceeds of the property—as will appear from the distribution ~~set~~ set forth in a copy of a statement of said distribution, hereto annexed as Exhibit E." p. 19.

P. PHILLIPS,
W. HALLETT PHILLIPS,
For Defendant in Error.